No. 84-68

In the Supreme Court of the United States

October Term 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

NAVAJO TRIBE OF INDIANS, et al.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE PHILLIPS PETROLEUM COMPANY, ET AL.

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Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, and Anadarko Production Company respectfully submit this brief as amici curiae in support of the position of petitioner Kerr-McGee Corporation. The written consent of the attorneys for petitioner and respondents for the filing of this brief has been obtained and filed with the Court.

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INTEREST OF AMICI CURIAE

Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas and Anadarko Production Company produce oil and gas from portions of the Navajo Indian Reservation in Utah under leases from the Navajo Tribe. If the Navajo Business Activity Tax and Possessory Interest Tax at issue in this case are ultimately upheld, these companies will, like petitioner, be required to pay those taxes. All of the oil and gas produced by these companies from the Navajo Reservation is sold in interstate commerce. The economic consequences of these tribal taxes will be felt nationwide by consumers, producers and distributors of energy from the Navajo Reservation.

The tribal leases under which these companies produce oil and gas on the Navajo Reservation were executed as early as 1947, and were all executed more than a decade before 1978, when the Navajo Tribal Council adopted the Business Activity Tax and the Possessory Interest Tax. The United States Department of the Interior approved the terms of each of these leases pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.* For a period of up to thirty years, these amici have developed the oil and gas reserves covered by their tribal leases on the Navajo Reservation in Utah. All of these operations have been supervised in detail by the Interior Department pursuant to federal regulations promulgated under section 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396d. *See* 25 CFR §211.1 *et seq.* (1984). Amici paid millions of dollars in cash

bonuses to the tribe to secure the leases; Phillips Petroleum Company, Shell Oil Company and Chevron U.S.A., Inc. alone paid the Navajo Tribe more than $3,000,000 in bonuses for leases in Utah between 1953 and 1959. Since acquiring the leases, amici have paid the tribe federally approved royalties of between 12.5 percent and 40 percent of the value of oil and gas produced and saved. Over the past decade amici have expended substantial sums for new wells and for secondary recovery measures aimed at increasing the productive life of oil and gas wells on the Navajo Reservation.

These amici curiae have themselves challenged the Navajo Business Activity Tax and the Possessory Interest Tax in litigation pending in the Tenth Circuit. *See Southland Royalty Co. v. Navajo Tribe of Indians,* 715 F.2d 486 (10th Cir. 1983). The Tenth Circuit's decision in *Southland,* rendered August 22, 1983, held that federal law does not require the Secretary of the Interior's review of these taxes and that the tribe's taxing power over oil and gas lessees is not divested by federal authority. 715 F.2d at 489. On September 20, 1983, amici petitioned the Tenth Circuit for rehearing in the *Southland* cases and suggested that rehearing he held *en banc*. Our petition for rehearing is pending.

Amici thus have a direct and vital interest in the issues presented in Kerr-McGee Corporation's petition. The outcome of this case and of the *Southland* cases will determine the viability of amici's investments in the Navajo Reservation and will shape future decisions regarding energy development of tribal lands throughout the United States.

SUMMARY OF ARGUMENT

Navajo taxes on energy exceed the limits imposed by federal law on the tribe's sovereignty over its external relations. In the absence of an express delegation of authority from Congress, tribes like the Navajo cannot lawfully govern their relations with non-Indians beyond what is necessary to protect tribal self-government or control internal relations. Because the Navajo taxes would impact producers, distributors and consumers of energy throughout a large sector of the United States, and because Congress has never authorized tribes not organized under federal law to regulate their external relations so sweepingly, the Navajo taxes must be invalidated.

The Navajo power to tax petitioner was, in any event, divested by the Secretary's regulation of tribal oil and gas operations for the common benefit of the lessor, the lessee and the consuming public. Congress has delegated to the Secretary the power to manage the tribe's energy resources. The Secretary's regulations are comprehensive and leave no room for regulation by another sovereign. The Navajo taxes will conflict with the objectives of Secretarial regulation and will undermine the leasing program mandated by Congress.

Even if the tribal power to tax oil and gas producers has not been so divested, it cannot be lawfully exercised without the approval of the Secretary. The requirement of Secretarial approval is a natural consequence of both the Secretary's pervasive duties in the area and the dependant status of the Navajo Tribe.

ARGUMENT

I. NAVAJO ENERGY TAXES EXCEED THE LIMITS IMPOSED BY FEDERAL LAW ON THE TRIBE'S SOVEREIGNTY

As separate sovereigns in the federal system, the states are free to tax locally produced natural resources sold or consumed beyond their borders, subject to the requirements of the Commerce Clause. Standing alone, the nondiscriminatory economic burden of state severance taxes on out-of-state consumers or businesses is insufficient to invalidate the taxes. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-25 (1981). Indian tribes, however, possess sovereignty of a diminished character. Although they may provide for their self-government and manage their territory, they may not regulate their external relations, that is, their relations with non-Indian citizens outside the reservation boundaries. In *United States v. Kagama*, 118 U.S. 375, 379-81 (1886), this Court said that the tribes govern "not as States, not as nations, not as possessed of the full attribues of sovereignty, but as a separate people, with the power of regulating their internal and social relations . . . ." Since the sovereignty of the Navajo Tribe falls short of permitting it to impair the economic interests of citizens beyond its reservation boundaries, and because that will be the direct consequence of the Business Activity Tax and the Possessory Interest Tax, these Navajo taxes must be invalidated.

A. *The Navajo Taxes Will Directly Impair the Interests of Non-Indian Citizens in Many States*

Energy development on Navajo lands is a matter of

national importance. The Navajo Tribal Council has characterized the Navajo Nation, covering 14 million acres in three states, as "a principal supplier of crucial energy resources critical to the development of the United States economy." Navajo Tribal Council Resolution CAP-34-80 (April 29, 1980). The Navajo Reservation is the largest of the 271 Indian reservations and communities in the United States and comprises more than one fourth of all Indian lands, both tribal and allotted, in the nation. The Utah portions of the Navajo Reservation have produced more than 200 million barrels of oil and more than 210 billion cubic feet of natural gas since the Utah Division of Oil, Gas and Mining began to keep production records in the early 1950's. Although neither the Bureau of Indian Affairs nor the United States Geological Survey has ever conducted a survey of the reserves of oil and gas on Navajo Reservation lands, the Navajo Tribal Minerals Development Office estimated in 1975 that there remained 100 million barrels of oil and 25 trillion cubic feet of natural gas. *Bureau of Competition, Federal Trade Commission Staff Report on Mineral Leasing on Indian Lands* (Oct. 1975) at 8 (hereinafter "Report on Mineral Leasing on Indian Lands"). All of the oil and gas produced and saved by these amici pursuant to their Navajo leases in Utah is sold in interstate commerce. Most of the oil from the Reservation is refined in Texas, and the refined products are sold throughout the Southwest and Midwest. Gas from the Reservation is transmitted to markets between New Mexico and central California.

The Navajo Business Activity Tax and Possessory

Interest Tax will naturally affect the prices consumers in these regions pay for energy resources originating on Navajo lands. Just as certainly, these tribal taxes will affect the willingness of producers to risk money on new development and exploration and on enhanced recovery measures for old wells on the reservation. Like all other energy producers in Utah, amici pay state taxes on production of Navajo resources and on property involved in production. The addition of Navajo tribal taxes on their property and production will place amici at a distinct commercial disadvantage with respect to competitors who produce oil and gas off the reservation. In the long run, the Navajo taxes will prevent the development of resources that otherwise would be sold to consumers throughout the western half of the United States.

The scale of energy development from the Navajo Reservation underscores an important fact: Navajo taxes on energy production and property will seriously affect the interests of non-ndians residing far beyond the boundaries of the Navajo Reservation. Although the inherent sovereignty of a tribe to control economic activity on its reservation and to manage its resources through taxation is now established, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), tribal taxes that seriously affect the interests of non-Indians outside the reservation must be analyzed differently. The Navajo taxes at issue here place in the hands of the Navajo Tribal Council the power to disrupt or discontinue the flow of important resources to consumers in many states. It is difficult to imagine a more potent tool for the Tribe to affect its external relations.

B. *The Navajo Tribe Lacks the Power to Regulate the Interests of Non-Indians Outside the Reservation.*

In *Montana v. United States*, 450 U.S. 544, 564 (1981), the Court stated:

> [I]n addition to the power to punish tribal offenders, the Indiar 'ribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. [Citations omitted.] *But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.*

(Emphasis added.) In reaching this conclusion, the Court drew from a line of authority — extending back to the first Indian case to reach this Court — prescribing the limits of tribal sovereignty. These cases teach that the dependent status of the tribes has stripped them of the "freedom independently to determine their external relations." *United States v. Wheeler*, 435 U.S. 313, 326 (1978). *See also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-10 (1978); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); *United States v. Kagama, supra*, 118 U.S. at 381-82 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Fletcher v. Peck*, 10 U.S.

(6 Cranch) 87, 147 (1810).[1]

The unfettered power of the Navajo Tribe to tax energy production is the power not only to undermine the leasing program mandated by Congress in the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.* (*see* Part II of this Argument); but it is as well the power unilaterally to burden the cost of energy for consumers and even to deprive millions of non-Indian citizens of the resources on which they depend. Congress has committed these resources to the management of the Secretary of the Interior, who must presumably execute his duty for the benefit of the entire nation, and not merely with an eye to the protection of the tribe's narrow economic interests. Congress has not delegated to the tribe any authority to control or manage the development of oil and gas on Navajo tribal lands. Because the continued development of those resources has a direct and substantial impact far beyond the reservation, the Navajo

[1] Likewise the **Handbook of Indian Law**, which has been cited repeatedly by this Court, confines the retained sovereignty of the tribes to matters of internal self-government:

> [T]he powers implicitly lost by tribes are the power to transfer tribal land without federal approval, the power to carry on relations with nations other than the United States, the power to regulate non-Indians when no tribal interest justifies such regulation, and the power to impose criminal punishment on non-Indians . . . .
>
> . . . Under some circumstances tribal powers can extend over members going beyond reservation boundaries, as well as over nonmembers within those boundaries. **The determinative factor is whether the matter falls within the ambit of internal self-government.**

R. Strickland, et al., Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.) 245-46 (emphasis added) (hereinafter "**Handbook of Federal Indian Law**").

taxes cannot survive without express congressional delegation.

This case is fundamentally different from *Merrion v. Jicarilla Apache Tribe, supra.* The Jicarilla Apache Reservation is approximately five percent of the size of the Navajo Reservation, and the Jicarilla lands committed to energy production are proportionately smaller.[2] As a result, the national impact of Navajo energy taxes will be significantly greater than the impact of the Jicarilla taxes. But two additional factors decisively distinguish *Merrion*. First, Congress explicitly permitted tribes, like the Jicarilla Apache Tribe, organized under the Indian Reorganization Act, 25 U.S.C. §§476-77, to manage development of their own leased minerals with the approval of the Secretary of the Interior. *See* 25 U.S.C. §396b; *Merrion, supra,* 455 U.S. at 150. As this Court said in *Merrion,* "Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." *Id.* at 155. Congress has not, however, "affirmatively acted" to permit the Navajo Tribe to regulate the flow of oil and gas from the Reservation; to the contrary, the Navajos claim the inherent authority to do so free of federal control. It is inconceivable that, as a matter of federal law, the Navajo Tribe holds the power to manipulate — through taxation — the nationally important reserves of

[2] Between 1961 and 1974, approximately 220 tracts from the Jicarilla Apache Reservation were offered for oil and gas leasing purposes. During the same period, over 2100 tracts from the Navajo Reservation were offered for oil and gas leasing. **Report on Mineral Leasing on Indian Lands, supra,** at 106.

oil and gas held in trust by the United States and to do so without Secretarial supervision.[8]

Second, and undoubtedly because of the Secretary's approval of the Jicarilla Apache taxes in accordance with law, the Court in *Merrion* made no particularized inquiry into the national impact of the Jicarilla Apache taxes on energy from that tribe's lands. The Court characterized the tribe's power to tax as an aspect of the tribe's power to control economic activity and territorial management. 455 U.S. at 137. In this case, however, the Navajos' right to manage tribal lands and their internal economy cannot possibly justify the sweeping economic consequences of those taxes to non-Indians outside the reservation. The importance of the resources at issue here transcend the Navajos' localized desire to govern themselves. At the very least, the Navajos' claimed right to regulate the economic interests of non-Indians outside the resrvation must be carefully weighed against the national interest in maintaining inexpensive domestic sources of energy. If, as we believe, the national interest at stake in these tribal taxes is found to outweigh

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[8] In his most comprehensive opinion on the scope of tribal powers, the Interior Solicitor concluded that, although the tribes generally possess the power to tax nonmembers accepting the privilege of trade with the tribes, the power of tribes to tax non-Indians whose relations are governed by the Interior Department is different:

> [Since] Congress has conferred upon the Commissioner of Indian Affairs exclusive jurisdiction to appoint traders on Indian reservations and to prescribe the terms and conditions governing their admissions and operations . . . an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the Commissioner of Indian Affairs to do so.

"Powers of Indian Tribes," 55 I.D. 14, 48 (1934). **Accord**: 1 Op. Att'y Gen. 645, 650 (1824).

the tribal interest in self-government, the limits of the tribe's inherent sovereignty must be accordingly limited to prevent the imposition of the taxes.

II. FEDERAL REGULATION OF TRIBAL OIL AND GAS PRODUCTION DIVESTS THE NAVAJO TRIBE OF THE POWER TO TAX OIL AND GAS PRODUCTION AND PROPERTY.

If the Navajo Tribe ever possessed the power to regulate oil and gas production consumed beyond the borders of its reservation, that power was divested by the comprehensive enactments of Congress giving the Secretary of the Interior the power to regulate the leasing and production of oil and gas from tribal lands. In proceedings below, the Ninth Circuit rejected the contention that the Indian Mineral Leasing Act, 25 U.S.C. §396a *et seq.*, deprived the Navajos of the power to levy these taxes. The Ninth Circuit held that (1) the purpose of the Indian Mineral Leasing Act "was not to generate distinctions" between tribes organized under the Indian Reorganization Act, whose taxing authority was not divested by federal regulation, and tribes not so organized, and (2) nothing in the Indian Mineral Leasing Act mentions tribal taxation. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 601 (9th Cir. 1984). The Ninth Circuit, however, failed to take into consideration the comprehensive character of federal regulation over Navajo oil and gas operations and the necessary conflict between federal control and tribal regulation of the same subject matter.

A. *Federal Regulation of Navajo Oil and Gas Operations is Comprehensive*

In the Indian Mineral Leasing Act, 25 U.S.C. §396a, *et seq.*, Congress directed the Secretary to promulgate rules and regulations covering "[a]ll operations under any oil, gas, or other mineral lease issued pursuant to any act affecting restricted Indian lands." 25 U.S.C. §396d. The Act was intended to be the "comprehensive legislation governing the leasing of tribal lands for mining purposes." *Handbook of Federal Indian Law, supra,* at 534. Pursuant to Congress's broad directive, the Secretary has promulgated a comprehensive array of regulations to cover every aspect of the acquisition of oil, gas and mineral leases from tribes, the terms of such leases, the timing of payments under such leases, operations under leases, cancellation and assignment of leases, safety, disposal of waste, surface restoration, unitization and cooperative development of leased property, and mining and and processing methods. *See* 25 CFR Parts 211-27 (1984). The regulations apply to both allotted and tribally held lands, except where superceded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act and approved by the Secretary. 25 C.F.R. §211.39 (1984).

The Secretary's regulations serve at least four purposes integral to the success of oil and gas operations on tribal lands.

First, the regulations created a uniform scheme for the acquisition and development of "[a]ll operations under any oil, gas or other mineral lease issued pursuant

to the terms of any act affecting restricted Indian lands." 25 U.S.C. §396d. Uniformity in the law relating to the leasing of tribal lands was Congress's express purpose in the Indian Mineral Leasing Act. H. R. Rep. 1872, 75th Cong., 3d Sess. (March 3, 1938). In the case of tribes that did not organize under the Indian Reorganization Act, the goal of uniformity was met by the Secretary's consistent application of national regulatory standards. In the case of organized tribes, the goal of uniformity was advanced by the requirement of prior Secretarial approval of tribal resolutions affecting the leasing of oil and gas property. *See Crow Tribe of Indians v. Montana,* 650 F.2d 1104, 1112 (9th Cir. 1981) *amended,* 665 F.2d 1390 (9th Cir.), *cert denied,* 459 U.S. 916 (1982) (stating that the Act gave organized tribal governments "control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part with the Secretary.").

Second, the regulations discharge the trust responsibility of the United States to the tribes by carefully prescribing the conditions of development and terms of compensation to the tribes. *Kenai Oil & Gas Corp. v. Department of the Interior,* 522 F. Supp. 521, 535 (D. Utah 1981); *United States v. 9,345.53 Acres,* 256 F. Supp. 603, 605 (W.D.N.Y. 1966), *rev'd on other grounds sub nom. United States v. Devonian Gas & Oil Co.,* 424 F.2d 464 (2d Cir. 1970).

Third, the Secretary's regulations protect the rights of private lessees. For example, they provide that lessees

may not be "held liable for loss or destruction of . . . oil . . . by causes beyond the lessee's control." 25 C.F.R. §211.13 (1984). They provide that gas produced from leases may only be used by the tribal lessor if the lessee's requirements for development and operation of the leases have been met. *Id.* Most significantly, the regulations prohibit any escalation in the percentage royalty to the tribal lessor after advertisement of the lease for bid. *Id.* Elsewhere the regulations prohibit the application of any new regulations, after Secretarial approval of the lease, that would "operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease." *Id.* §211.28. In protecting the lessees of tribal lands from unconsented changes in the tribe's remuneration or other essential lease terms, the Secretary's regulations ensure the continued viability of operations under tribal leases. If the tribes are free unilaterally to increase their share of the proceeds from oil and gas operations, Secretary-approved leases mean nothing, and the lessees' incentive to continue investing and operating is reduced.

Fourth, consistent and continued federal supervision over all aspects of oil and gas development on tribal lands guarantees the availability of those critical resources to the public. The Interior Department's *Handbook on Federal Indian Law* noted:

> Recognition of energy shortages has brought the economic significance of Indian energy resources into sharp focus . . . . In 1973 the Department of the Interior estimated that the oil and gas reserves of forty Indian reservations amounted to 4.2 billion barrels of oil and 17.5 trillion cubic feet of gas. Those figures represented roughly three percent of the nation's known reserves at that time. Indian coal reserves are located on at least thirty-three reservations which, as of 1975, were estimated to contain from one hundred to two hundred billion tons or from seven to thirteen percent of the nation's total identified reserves.

Handbook of Federal Indian Law, supra, at 531. In 1975, the staff of the Federal Trade Commission reported that "in both absolute and relative terms, from a national perspective . . . the mineral resources on Indian lands are great indeed." *Report on Mineral Leasing on Indian Lands, supra,* at 10. The same report found that, despite the national importance of these resources, each tribe has formulated its own leasing policy independent of any overall federal energy program. "Each tribe's leasing objectives are felt to be valid for that tribe, even if they differ from those of other tribes or those of public land leasing." *Id.* at 39. Under these circumstances, it is inconceivable that Congress would cede ultimate management authority over these resources to the tribes. To the contrary, the Secretary's comprehensive regulations under the Indian Mineral Leasing Act and his supervision of organized tribal regulations assure the continued dominance of a national energy policy for the public good.

B. *The Navajo Taxes Conflict with Federal Regulation*

In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the Court characterized tribal taxing power as a retained attribute of tribal sovereignty except as a tribe may be "divested

of it by federal law or necessary implication of their dependent status." 447 U.S. at 152. Respecting the doctrine of federal "divestitute" of tribal sovereignty, the *Colville* Court commented: "This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . . ." *Id.* at 153-54. In the present case, the facts argue forcefully for divestiture of tribal sovereignty. Without federal approval and independent of any federal supervision, the Navajos have asserted the power to tax an area that is comprehensively regulated by the Secretary. With one significant exception, the Secretary's regulations fully occupy the field of tribal oil and gas leasing operations — leaving no room for regulation by any other sovereign.[4] The sole exception to the Secretary's exclusive authority derives from language in the Indian Mineral Act itself.

[4] At least three lower courts have concluded that the Indian Mineral Leasing Act preempts state regulation on restricted Indian lands. **See Crow Tribe v. Montana**, 650 F.2d 1104 (9th Cir. 1981) **amended**, 665 F.2d 1390 (9th Cir.), **cert. denied**, 459 U.S. 916 (1982) (holding that the Act preempted Montana's coal severance tax on the Crow Tribe's lessees); **Samedon Oil Corp. v. Cotton Petroleum Corp.**, 446 F.Supp. 521 (W.D. Okla. 1978) (holding that the Secretary's regulations precluded the application of Oklahoma's communitization orders on tribal lands, in the absence of Secretarial approval of the orders); **Assiniboine & Sioux Tribes v. Calvert Exploration Co.**, 223 F.Supp. 909 (D. Mont. 1963) (state-ordered pooling on Indian oil and gas lands was precluded by federal regulation, in the absence of Secretarial approval), **rev'd on other grounds sub nom. Yoder v. Assiniboine & Sioux Tribes**, 339 F.2d 360 (9th Cir. 1964) (holding the case should be dismissed for lack of jurisdictional amount). **See also Blackfeet Tribe of Indians v. Montana** 729 F.2d 1192, 1203 (9th Cir.), **cert. granted**, 53 U.S.L.W. 3235 (1984). Likewise the Solicitor of the Interior Department has twice concluded that the Indian Mineral Leasing Act preempts state taxation of non-Indian mineral production on tribal lands. 84 I.D. 905 (1977); 86 I.D. 181 (1979). **See also** B. T. Dolan, "State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations," 21 **Rocky Mtn. Min. L. Inst.** 475, 527 (1975) ("the federal government has entirely occupied the field").

Thus the proviso in Section 2 of the Indian Mineral Leasing Act, 25 U.S.C. §396b, permits tribes organized under the Indian Reorganization Act "to lease lands for mining purposes" in accordance with tribal constitutions and charters adopted under the Indian Reorganization Act. Referring to this proviso, *Merrion* held that the Indian Mineral Leasing Act "does not prohibit the Tribe from imposing a severance tax on petitioner's mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary." *Merrion, supra,* 455 U.S. at 158. The Act does not, however, confer any similar authority upon tribes, like the Navajo Tribe, which have never organized under the Indian Reorganization Act. As to the Navajos, the authority to regulate oil and gas lessees remains where Congress conferred it in the Indian Mineral Leasing Act — with the Secretary of the Interior.

Any different result would ignore Congress's explicit differentiation between organized and other tribes and would, moreover, conflict with the purposes of the Indian Mineral Leasing Act. If tribes having no authority from Congress are left at large to tax the business or property of their oil and gas lessees, the effective burden on lessees will vary drastically from reservation to reservation, despite the objective of uniform federal regulation. The Secretary's prescription of uniform terms of compensation in tribal leases and his exclusive power to fix

higher rates of royalty will become irrelevant if unauthorized and unsupervised tribes may exact additional compensation in the form of taxes.[8] Further, the Secretary's regulations protecting the rights of lessees will become meaningless if the Navajo Tribe may, without federal supervision, penalize or terminate the rights of lessees under tribal tax ordinances.

The unsupervised power of tribal taxation, and particularly the tribal power unilaterally to discontinue the rights of lessees, will jeopardize the very tribal interests normally protected by the Secretary's regulations. In *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.), *cert. denied*, 52 U.S.L.W. 3461 (1983), the Ninth Circuit held that the tribe could not lawfully terminate a commercial lease without Secretarial approval. In the course of its opinion, the court said:

> [P]ossession by a tribe of a unilateral power to terminate will tend to depress the value of the lease to the lessee and discourage the erection of substantial improvements on the leasehold. This could reduce the return to tribes from long-term commercial leases. . . . It is doubtful that lessees will be able to purchase sufficient immunity from

[8] **Merrion** cautioned against confusing the tribe's role as a "commercial partner," whose royalty is fixed by lease, with its role as a sovereign having the power to tax without the consent of taxpayers: "Whatever place consent may have in contractual matters . . . it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." **Merrion, supra,** 455 U.S. at 147. Where, however, the tribe's unsupervised power of taxation undermines the power of the United States to regulate the duration of leases and lease compensation, consent or the absence of consent is not the issue. Rather, the continued supremacy of federal policy is at stake.

> terminations to enable the tribes, in a sense, "to capitalize" the value of their termination power by insisting upon a lease bonus as the price of its surrender. Should this be true it is likely that commercial leases will yield a lower return to the tribes.

707 F.2d at 1075. The problems created by Navajo tax ordinances are precisely analogous. The tribal power to tax and terminate private energy development will naturally depress the value of oil and gas leases to the lessee —a result with which the Secretary must be vitally concerned if he is to regulate leasing for the long-term benefit of the Tribe. Directed by an independent judgment and will, the Navajo Tribe will be free to burden or discontinue oil and gas development for its own purposes. The most fundamental objective of the Indian Mineral Leasing Act and the Secretary's regulations is that private development of tribal lands will continue within the framework of federal supervision. The Navajo taxes approved by the Ninth Circuit would jeopardize that objective and therefore cannot stand.

III. THE NAVAJO TAXES ARE INVALID UNLESS APPROVED BY THE SECRETARY

The Ninth Circuit held that neither the Indian Mineral Leasing Act nor the Indian Reorganization Act requires that the Secretary review and approve the Business Activity Tax and Possessory Interest Tax as a prerequisite to their validity. *Kerr-McGee Corp. v. Navajo Tribe of Indians, supra,* 731 F.2d at 604. The Ninth Circuit's decision, however, does not explain how the Secretary's refusal to review the Navajo taxes can be squared with

his statutory duty to regulate "[a]ll operations under any oil, gas or other mineral lease." 25 U.S.C. §396d. As we have argued in Part II of this Argument, the Tribe's unrestrained power to tax is no less than the power unilaterally to manipulate the leasing program entrusted to the Secretary's care. The Secretary cannot be said to have discharged his duty to regulate if he permits the Navajo Tribal Council to regulate in his place. Secretarial review of tribal energy taxes is the very least that producers may expect from statutorily mandated federal supervision of reservation oil and gas operations.

The requirement of Secretarial approval of tribal energy taxes is a natural consequence of the dependant status of Indian tribes. In *Merrion*, this Court said with reference to the Jicarilla Apache Tribe:

> Of course, the Tribe's power to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Merrion, supra, 455 U.S. at 141. Elsewhere *Merrion* affirmed the importance of Secretarial review and approval as having been required by Congress "to monitor such exercises of tribal sovereignty." *Id.* at 155.

Since the Secretary has failed in this case to review the tribal taxes, there exists no "constraint" to temper the concern that the Navajo Tribal Council will act "in an unfair or unprincipled manner." There will be no insurance that the "exercise of the tribal power to tax will be consistent with national policies." The decision of the Ninth Circuit on this point ignores both the importance of Secretarial review to producers and the requirements of Congress's delegation of authority in the area.

CONCLUSION

This case is a watershed in the history of tribal sovereignty. If the decision of the Ninth Circuit is to be affirmed, this Court will turn away from its own decisions extending over 170 years, which have restrained tribes from regulating their external relations with non-Indian citizens outside reservation lands. The power to tax nationally critical resources free of federal constraint and irrespective of federal purpose exceeds even the most expansive definitions of tribal sovereignty announced by this Court. Either the Navajo Tribe is a domestic, dependant sovereign without the power to impair the interests of citizens beyond reservation boundaries — in which case the Navajo taxes are unlawful — or else the Navajo Tribe is an independent sovereign on an equal footing with the states. It is impossible to square the settled limits on the sovereignty of the Navajo Tribe with the tribal power of taxation claimed in this case.

The Navajos' taxing power cannot coexist with the comprehensive regulatory authority of the United States. If the Ninth Circuit's decision is affirmed, the federal authority vested by the Indian Mineral Leasing Act will

be comprehensive in name only. The Navajo taxing power would diminish federal authority just as surely as a tribal attempt to regulate the details of oil and gas leasing without federal oversight. At a minimum, the Secretary of the Interior must be required to review the Navajo taxes. His approval as a prerequisite to the validity of the taxes is the least that can be expected of federal supervision.

For the foregoing reasons, these amici urge the Court to reverse the decision below and to hold that the Navajo Possessory Interest Tax and Business Activity Tax are unlawful and void.

Respectfully submitted,

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